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THE DEVELOPMENT OF PRIVATE LAW DOCTRINE IN THE FIELD OF PROTECTION OF SUBJECTIVE CIVIL RIGHTS

Abstract. *The protection of subjective civil rights was the subject of the close attention of civilists for many decades. At the same time, the accents of doctrinal substantiation acquire unique expression due to the nature of private legal policy, expressed in the principal act of civil legislation. The adoption of the Civil Code of Ukraine in 2003 as the constitution of private law for the future of civil society with a developed market economy has led to a significant intensification of scientific research in the field of the relevant issues. The provisions of the current Civil Code of Ukraine, which to a large extent formed the modern institute for the protection of subjective civil rights, became a significant factor in the development of national civilist doctrine in the post-Soviet period.*

The purpose of the article is to analyze and define the general vector of the private law doctrine development in the sphere of subjective civil rights protection taking into account the changes that took place in the legal regulation of the institute of subjective civil rights protection following the adoption of the current Civil Code of Ukraine and reforming the procedural legislation of Ukraine within the framework of the judicial reform.

Emphasis was placed on the need to differentiate the right to remedy from the protection of rights as tangible actions directly aimed at protecting the violated right. The conclusion on the necessity of considering the category of protection of rights, first of all, in the system of the mechanism of realization of civil rights is reached. At the same time, the stage of protection of rights is recognized as an optional stage of the mechanism of realization of subjective civil law and is separated from other stages, because it has inherent

features that make it impossible to combine it with the stage of formation of subjective law, as well as its realization. The relationship between the protection of rights and other civilistic categories, such as legal safeguard, legally protected interest and civil liability, has been elucidated. Within the framework of the study of the institute of protection of rights, the legal phenomenon of the misuse of a right has been analyzed. We propose an approach to the legal consequences of qualifying the method of protection as general or special in the context of law enforcement practice. The general vector of private law doctrine development in the sphere of subjective civil rights protection at the present stage is recognized to be ensuring the effective protection of subjective civil rights. It has been established that the relevant changes permeate the whole Institute of the protection of rights, starting from its doctrinal interpretation and interaction with other related institutions, up to the influence of the doctrine on the formation of new legislative approaches and actual judicial practice, since the prevailing task of court proceedings under the new procedural legislation is to ensure effective protection of the rights of the person filing a lawsuit.

Key words: *the right to remedy, protection of rights, civil liability, legal abuse, general and special remedies, the principle of effective human rights protection.*

With the adoption of the Civil Code of Ukraine in 2003, the protection of subjective civil rights became one of the most frequently discussed issues in Ukrainian civil law science. We need to mention a number of monographic studies of general problems of civil rights protection prepared by Ukrainian scientists: «Safeguard and protection of rights and interests of individuals and legal entities in civil legal relations»[1], «Peculiarities of subjective civil rights protection»[2] and others. Certain issues of civil rights protection were studied by famous Ukrainian civilists N. S. Kuznietsova[3], O. D. Krupchan[4], S. O. Pohribnyi[5], I. O. Dzera[6] and many others. It should be emphasized that recently the problem of protection of rights has been actively researched during the development of dissertations for the degrees of doctor and candidate of legal sciences, which again emphasizes the relevance of

[1] Охорона і захист прав та інтересів фізичних та юридичних осіб в цивільних правовідносинах / За заг. ред. академіка НАПрН України Я. М. Шевченко. – Х: Харків юридичний, 2011.

[2] Особливості захисту суб'єктивних цивільних прав: Монографія / За заг. ред. академіків НАПрН України О. Д. Крупчана та В. В. Луця. – К.: НДІ приватного права і підприємництва НАПрН України, 2012.

[3] Див., зокрема: Кузнєцова Н. С. Цивільно-правова відповідальність і захист цивільних прав // Вісник Київського університету ім. Т. Шевченка. – Юридичні науки. – 2009. – Випуск 81. – С. 100–106.

[4] Див.: Крупчан О. Д. Методологічні засади приватноправової сфери громадянського суспільства // Право України. – 2009. – № 8. – С.47–52.

[5] Див., зокрема: Погрібний С. О. Механізм та принципи регулювання договірних відносин у цивільному праві України: Монографія / С. О. Погрібний. – К.: Правова єдність, 2009.

[6] Див., зокрема: Дзера І. О. Цивільно-правові засоби захисту права власності в Україні / І. О. Дзера. – К., 2001.

legal research in the field of civil rights protection.

It is necessary to agree with the thesis stated by N. S. Kuznetsova that «legal regulation of any social relations, connected with the process of transformation of legal prescriptions in the plane of actual social relations, provides that each subjective right in case of its violation is guaranteed by the possibility of its forced restoration or protection»[1].

This function was executed by the new Civil Code of Ukraine of 2004, which, unlike the previous codifications of civil legislation of Ukraine, provided a rather detailed regulation of the institute of implementation and protection of civil rights. Therefore, there are good reasons to assert that the provisions of the new Civil Code (some of which were, at the time of its adoption, if at least, very progressive for the post-Soviet society) gave a significant impetus to the development of fundamental civilist research in Ukraine, in particular, to the doctrine of protection of subjective civil rights.

The purpose of the article is to analyze and define the general vector of private law doctrine development in the sphere of subjective civil rights protection taking into account the changes that took place in the legal regulation of the institute of subjective civil rights protection as a result of adoption of the current Civil Code of Ukraine and reforming the procedural legislation of Ukraine within the framework of the judicial reform.

But what new developments have emerged in the regulation of the institute of protection of subjective civil rights with the adoption of the new Civil Code and how do these regulations work now?

Part 1 of Article 15 of the Civil Code of Ukraine stipulates that every person has the right to remedy his or her civil rights in case of its violation, non-recognition or challenge (emphasis added – *O. K.*). There are grounds to believe that the right to protection in the context of this article is considered as a subjective right of a person participating in civil legal relations, which arises in the event when: 1) the civil rights and interests belonging to it are violated (in particular, non-fulfillment or untimely fulfillment of an obligation, preservation or acquisition of property without a sufficient legal basis, etc.); 2) these rights are not recognized (for example, non-recognition of a person as the assignee of a reorganized legal person, non-recognition of the property right to certain property); 3) the civil rights (in particular, contest of the property right to inheritance, etc.) are challenged.

As O. D. Krupchan points out, the right to judicial protection of civil rights and interests is a key element in the construction of civil law, which is characterized by the absolutism of character, the ability to independently address issues of protection or self-protection through the universality of protection methods[2].

[1] Див.: Кузнєцова Н. С. Вказ. твір. – С. 100.

[2] Див.: Особливості захисту суб'єктивних цивільних прав: Монографія / За заг. ред. академіків НАПрН України О. Д. Крупчана та В. В. Луця. – К.: НДІ приватного права і підприємництва НАПрН України, 2012. – С. 7.

However, what is understood by the right to protection in legal science?

V. P. Grybanov, one of the most famous researchers of this problem in Soviet times, noted that the civilist literature does not contain an exact answer to this question[1]. There is no unambiguous answer to this question even now – neither in Ukrainian civilism, nor in the science of civil law of other former Soviet republics.

Despite the fact that the right to protection in practice is most often realized through procedural rules, there is no doubt that in its essence it is primarily a substantive category, not a procedural one, although very closely related to procedural rules. Taking into account the legislative regulation of the institute of protection of rights in the civil law of Ukraine, there are grounds to believe that the methods of protection of civil rights established in Art. 16 of the Civil Code, the human right to self-protection against offenses and unlawful encroachments provided for in Art. 19 of the Civil Code, the right of a person to protect his or her rights at his or her own discretion, enshrined in Art. 20 of the Civil Code of Ukraine, certainly testify to the fact that the protection of rights can be carried out both with the involvement of authorized bodies (in the manner prescribed by the procedural legislation) as well as independently by the rights holder without the participation of such bodies under the relevant provisions of civil law (substantive law). V. P. Grybanov noted in this regard that it is hardly appropriate to reduce the content of the right to protection only to the possibility to address the demand for protection of the right to the relevant state or public bodies. The right to a remedy in its material sense represents the possibility of applying coercive measures against the violator. At the same time, the possibility of applying coercive measures against the violator should not be understood only as putting into effect the apparatus of state coercion[2].

Analyzing the legal nature of the right to defense, M. K. Suleimenov singles out three main views on the essence of the right to protection: the right to protection as one of the components of subjective civil law – along with the right to their own actions and the right to demand certain behavior from the obligated persons; the right to protection as an independent subjective right that arises at the moment of violation of a right, but not within the framework of the regulatory (legal) relationship that already existed at the time of the violation, but within the limits of the new protective relationship; and a compromising view that the right to protection is one of the entitlements of a subjective right, but it is transformed as a result of an offense into a separate subjective right[3].

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[1] Див.: Грибанов В. П. Осуществление и защита гражданских прав. – М.: «Статут», 2000. – С. 105.

[2] Див. Грибанов В. П. Вказ. твір. – С.106.

[3] Див.: Сулейменов М. К. Субъективное гражданское право и средства его обеспечения в Республике Казахстан // Субъективное гражданское право и средства его обеспечения. Материалы Международной научно-практической конференции, посвященной памяти Ю. Г. Басина (в рамках ежегодных цивилистических чтений). Алматы, 13–14 июня 2005 г. / Отв. ред. М. К. Сулейме-

It seems that such a diversity of scientific views on the legal nature of the institute of protection of rights has become the basis for the existence of a number of definitions of the right to protection, which, although not contradictory, are in different planes and patterns.

For instance, E. O. Krasheninnikov believes that the right to protection is a possibility, established by the rule of law, of certain behavior of a person in a conflict situation, given to him/her in order to protect a regulatory subjective right or a legally protected interest[1].

O. I. Matsegorin considers the protection of rights as a possibility given to a person empowered to use law enforcement measures to restore the violated right. Developing this thesis, the scholar points out that legal protection should be considered in two main planes: law enforcement regulation of civil relations and human rights installation of legal means aimed at the implementation of subjective civil law and prevention of its violation[2].

Yu. D. Prytyka, referring to the scientific works of V. P. Grybanov, notes that the substance of protection of subjective rights is to remove obstacles to the implementation of their rights by subjects. Therefore, he believes that the traditional definition of the protection of rights can be slightly modified, based on the category of activities, which will better reflect the qualities inherent in this legal phenomenon. Thus, the protection of rights, according to Yu. D. Prytyka, can be defined as a legal activity aimed at removing obstacles to the exercise by subjects of their rights and termination of violations, restoration of the situation that existed before the violations[3].

The analysis of the given definitions provides the grounds to assert that the terms "right to a remedy" and "protection of rights" or "legal protection" in civil law science are sometimes unjustifiably equated. Even going deep into the discussion about whether the right to protection is an independent subjective right, a secondary right or one of the powers of the subject of civil rights, it is necessary to separate it from real actions directly aimed at the protection of the violated right. Therefore, it seems reasonable to conclude that the right to protection is a possibility provided by law to apply coercive measures established by law or contract, aimed at termination of the offense and restoration of the violated right or if it is impossible to restore it, at compensation of the damage and moral harm caused by the offense. At the same time, the protection of rights is the actions of the empowered person aimed at achieving the said goal.

The position expressed in due time

нов. – Алматы: НИИ частного права КазГЮУ, 2005 – С.31–32.

[1] Див.: Крашенинников Е. А. Структура субъективного права и право на защиту // Проблема защиты субъективных прав и советское гражданское судопроизводство. – Ярославль. – 1979. – С. 79–80.

[2] Див.: Мацегорін О. І. Поняття та зміст захисту цивільних прав // Часопис Київського університету права. – 2011. – № 3. – С.144.

[3] Див.: Притика Ю. Д. Поняття і диференціація способів захисту цивільних прав та інтересів // Вісник Київського університету ім. Т. Шевченка. – Юридичні науки. – 2004. – Випуск 60–62. – С. 16–17.

by H. Ya. Stoiakin, who asserts that legal protection includes: the publication of norms establishing rights and obligations, determining the ways of their implementation and protection and threatening with the application of sanctions; the activities of subjects to exercise their rights and protect subjective rights; the preventive activities of state and public organizations; the activities to implement legal sanctions, is not indisputable[1].

In this context, it should be noted that the category of protection of rights, in our opinion, should be considered, first of all, in the system of the mechanism of implementation of civil rights, which generally includes the following main stages: formation or establishment of a right; implementation of the right and protection of the right. The protection phase is an optional phase of the mechanism for the exercise of subjective civil rights. If there are no grounds for protecting the right, the right to protection is not transformed into actual activities of the subject aimed at terminating the infringement and restoring the violated rights.

Thus, legal protection, as one of the stages of the mechanism for the implementation of subjective right, must be separated from other stages, since it has features that make it impossible to combine it with the stage of formation of a subjective right, as well as its implementation.

In order to best illustrate the existing approaches to the definition of the institute of protection of rights, it is also worth analyzing its relationship to such categories of civil law as a safeguard of rights, legally protected interest and civil liability.

The relationship between the categories «protection of a right» and «safeguarding of a right» has been the subject of extensive discussion in the legal literature. L. O. Krasavchikova's approach to the differentiation of these concepts, according to which the safeguarding of rights are the measures applied to the violation of rights and obligations, and the protection is the measures applied after the violation to restore the violated rights, a separate type of the safeguarding that is applied in case of an existing violation, should be considered successful and legally balanced[2].

The most common view is that the notion of legal safeguarding is broader than that of protection. Historically, this view has been supported for a long time by representatives of the procedural law discipline, who regarded the right of protection only as the actions of the competent state authorities aimed at protecting the violated right. Among Ukrainian civilists, this position was consistently taken by Ya. M. Shevchenko. Such views are expressed by some representatives of the St. Petersburg school of civilism, who believe that the safeguarding of a right in the broad sense includes not only legal, but also economic, political, orga-

[1] Див.: Стоякин Г. Я. Понятие защиты гражданских прав // Проблемы гражданско-правовой ответственности и защиты гражданских прав. – Свердловск, 1973. – С. 34.

[2] Див.: Красавчикова Л. О. Гражданско-правовая охрана личной жизни советских граждан: Автореф. Дисс.… канд. юрид. наук. Свердловск, 1979. – С.7.

nizational and other measures aimed at creating the necessary conditions for the exercise of subjective rights, so this concept is broader than the concept of «protection of rights»[1].

In addition to this position, there were ideas that the concepts of legal safeguarding and legal protection were identical, or the latter is broader than the concept of the first. At the same time, some scholars generally believed that «legal protection» was not a legal category and was devoid of any legal weight.

In his time, V. P. Grybanov emphasized that the importance of the study of the correlation between the subjective right and the interest is due to the fact that the exercise and protection of civil rights are inextricably linked, on the one hand, with the problem of legal protection of the interests of society as a whole, and on the other hand, with the problem of ensuring the correct combination of individual interests with the interests of society[2].

Analyzing the question of correlation between the categories of protection of rights and protection of interest, the scholar notes that safeguarding of interests should be understood as the whole system of norms, guarantees, principles, opportunities, and permissions that constitute the mechanism of realization of legally protected interests. Protection of interests, in turn, is defined as a spectrum of actions (not only possible but also, according to the law, admissible), which are directed on the elimination of obstacles in the realization of interest protected by the law.

Some Ukrainian researchers believe that the correlation between safeguarding and protection should be considered in the form of a certain system of counterweights, in which, on the one hand, safeguarding is provided exclusively to legitimate interests, and on the other hand, protection of legitimate interests is provided exclusively by legal methods[3].

The relationship between the protection of rights and civil liability is somewhat different. Most academics agreed that civil liability cannot be considered separately from the institute of protection of rights.

At first glance, the difference between the institute of civil liability and the institute of protection of rights is ostensibly on the surface, because civil liability always has a proprietary nature, and the protection of rights is carried out in a way that most effectively will restore the violated right (and such methods are not always property-oriented).

At the same time, the institute of civil liability, as well as the institute of protection of rights, despite the constant attention of researchers, is one of the institutes of civil law over which the debate continues. This applies to the concept of civil liability, its grounds, conditions of occurrence and the like. Therefore, it is worthwhile to dwell on the issue of the relationship between the institute of protection and the institute of civil liability in more detail.

[1] Див.: Гражданское право. Ч. 1 / под ред. Ю. К. Толстого, А. П. Сергеева. – М. : Проспект, 1996. – С.240.

[2] Див.: Грибанов В. П. Вказ твір. – С.234.

[3] Див.: Венедіктова І. В. Захист охоронюваних інтересів у цивільному праві: Дис… докт. юрид. наук:12.00.03. – К., 2013. – С.149.

It is worth to agree with the existing position in the science of civil law, the essence of which is that in case of violation of the regulatory legal relationship, the content of which is positive subjective rights and obligations, it is transformed into a protective legal relationship, within which the restoration or protection of the violated rights should be carried out through the application of civil liability measures[1].

In order to determine the relationship between liability measures and ways of protecting civil rights, it is necessary to analyze in more detail the ways of protecting subjective civil rights enshrined in Ukrainian legislation.

Part 2 of Article 16 of the Civil Code provides that the following methods of protection of civil rights and interests may be used:

– recognition of a right;

– recognition of a transaction as invalid;

– termination of an action that violates a right;

– restoration of a position that existed before a violation;

– enforcement of an obligation in kind;

– change of legal relationship;

– termination of legal relationship;

– compensation for damages and other ways to reimburse property damage;

– compensation for moral damages;

– recognition of decisions, actions or inactivity of a public authority, authority of the Autonomous Republic of Crimea or local government, their officials and officers as illegal.

Taking into account the fact that the legislator has secured the possibility to protect civil law or interest in other ways established by contract or law (part 2 of Article 16 of the Civil Code), this list of remedies to protect rights and interests is not exhaustive. Therefore, under the new Civil Code, the parties, concluding an agreement, have the right to provide for special methods of protection of their rights in case of their violation by the counterparty. In practice, this normative clause may be implemented by including in the contract certain measures of operational impact, which are agreed by the parties and acquire the status of binding for the parties of the contract.

Moreover, given the reform of the procedural law as part of the judicial reform, which began in late 2014, substantive changes have also taken place, in particular, the provisions of the Civil Code of Ukraine, which regulate the right of a person to the protection of its subjective civil rights.

In the new procedural codes, the principle of effective protection of the rights of a complainant has been established as the predominant objective of legal proceedings.

In making procedural decisions and applying any procedural rules, the court must be guided first and foremost by the main task of legal proceedings, which is the effective protection of human rights and interests. The same principle is also the basis for the right of the court to apply, at the request of the person applying to the court, a method of protecting his or

[1] Див.: Кузнєцова Н. С. Вказ. Твір. – С.102.

her right, which is not provided by law or contract, if the methods provided by law or contract do not provide effective protection of such right. The provisions of the Civil Code of Ukraine have also undergone changes with the changes in the procedural codes.

Henceforth, according to Article 16 of the Civil Code of Ukraine, a court may protect a civil right or an interest in other ways established by a contract or by law or a court in cases determined by law.

Pursuant to part 1 of Article 2 of the Economic Procedural Code of Ukraine in the version that gained legal force on 15.12.2017. (provisions similar in content are also contained in the new Civil Procedural Code of Ukraine), the task of economic court proceedings is a fair, impartial and timely resolution of disputes related to business activities and consideration of other cases under the jurisdiction of the economic court in order to effectively protect violated, unrecognized or disputed rights and legitimate interests of individuals and legal entities, the state.

At the same time, the court and participants of the court proceedings shall be guided by such task of economic court proceedings, which prevails over any other considerations in the process (part 2 of Article 2 of the EPC of Ukraine).

Art. 5 of the new version of the EPC of Ukraine provides that in administering justice the court shall protect the rights and interests of individuals and legal entities, state, and public interests in the manner determined by law or contract.

If the law or the contract does not determine the effective way of protection of the violated right or interest of the applicant, the court in accordance with the claim of such a person may determine in its decision such a way of protection that does not contradict the law.

Para. 4 p. 3 of Art. 162 of the EPC of Ukraine provides that the statement of claim shall contain, in particular, the content of the claim: a method (methods) of protection of rights or interests provided by law or contract, or other method (methods) of protection of rights and interests that do not contradict the law and which the plaintiff asks the court to determine in its decision.

It is important that the court takes into account the method of protection chosen by the plaintiff when deciding whether to consider the case in a simplified or general procedure (paragraph 3 of Part 3 of Article 247 of the EPC of Ukraine).

In other words, the court may not use an effective method of judicial protection on its own initiative if it is not specified in the statement of claim.

There are grounds to believe that a party may insist on a remedy not provided for by law or contract only if the law or contract does not define an effective remedy for the infringed right or interest of the complainant.

Returning to the issue of correlation between the methods of protection of rights and civil liability measures, there is every reason to agree with N. S. Kuznietsova's conclusions. Thus, the civilist reasonably believes that both responsibility measures and methods of protection of rights and interests should be considered as certain legal instruments

of influence on the corresponding public relations. Besides, both measures of responsibility and remedies are aimed at localization of consequences of violation of rights. However, while the two legal instruments have a clear human rights purpose in common, the means of redress are broader in scope, as they not only provide for the restoration of the violated right or compensation for the loss caused by it, but also for the prevention, repression, and elimination of violations of a civil right. N. S. Kuznietsova argues that accountability measures provided by law are an integral part of the methods of civil rights protection[1].

Since the analysis of the institute of protection of rights revealed that the methods of protection of civil rights are quite different in their orientation, content, actors that can apply them, we consider it necessary to highlight the main doctrinal approaches to the classification of forms and methods of protection of civil rights.

As O. I. Matsegorin notes, there are no unified approaches to understanding the procedural form of protection in the theory of civilist science. Some scientists recognize under the procedural form a special legal construction, which is characterized by a certain set of procedures for the implementation of the relevant rights. Others believe that this legal construction is an element of the procedural form, and the procedural form itself is a form of law enforcement, which is embodied in the process of solving legal cases in the course of justice[2].

We support the point of view expressed by Yu. D. Prytyka, according to which «means» and «forms» of protection should not be confused with the notion of «method» of protection of rights. In the strict sense, all of them mean different actions aimed at the protection of rights, i.e. different elements (types or parts) of activities for the protection of subjective rights, although there are a close relationship and interdependence between them, which often leads to a juxtaposition of these concepts[3].

Ye. O. Kharytonov suggests classifying the forms of protection depending on the nature of the jurisdictional body performing the protection, such as judicial protection, administrative protection, notary protection, self-protection, protection with the help of other public, state and international institutions and their bodies[4].

A similar point of view is expressed by Yu. V. Bilousov, who, commenting on the provisions of Chapter 3 of the Civil Code of Ukraine, states that the legislator «carries out the classification of types of protection (*apparently, the forms of protection – O. K.*) depending on the subject of its implementation: by a court (Article 16 of the Civil Code of Ukraine), by public authorities, ARC authorities (p.17 of the Civil Code of Ukraine), by notary (Article 18 of the Civil Code of Ukraine), independently (Article 19 of the Civil Code of Ukraine)[5].

[1] Див.: Кузнєцова Н. С. Вказ. твір. – С.105.
[2] Див.: Мацегорін О. І. Вказ. твір. – С.145.
[3] Див.: Притика Ю. Д. Вказ. твір. – С.17.
[4] Цивільне право України: Підручник / Є. О. Харитонов, Н. О. Саніахметова. – К.: Істина, 2003. – С.183.
[5] Див.: Цивільний кодекс України: нау-

In our opinion, there are reasons to believe that the main approach to the classification of forms of protection of rights should be their differentiation on the subjective basis depending on whether the activity aimed at protection of the right is jurisdictional or not.

Classifying the methods of civil rights protection, researchers, first of all, distinguish between the substantive legal (compensation for damages, restoration of the position that existed before the violation, cancellation by a public authority of its act, termination of a contract by the parties, etc.) and procedural legal (actions of jurisdictional authorities aimed at protecting the violated right)[1].

Depending on the source of origin of the remedies, it is possible to identify the remedies directly established in the legislation and those established by the parties to the contract, as provided in Art. 16 of the Civil Code of Ukraine.

The remedies can be differentiated by taking into account the purpose of their application. Thus, we can distinguish the methods of protection aimed at stopping the violation of a right, at its restoration or at the compensation of material losses caused by the violation of a right (civil liability measures).

However, it is necessary to admit that no classification, as it is known, can be ideal, but it is extremely useful for obtaining a systematic view of the legal phenomenon being analyzed.

The research of the institute of protection of rights suggests the necessity to analyze such legal phenomenon as **abuse of law (legal abuse)**.

In the academia of civil law, the debate on the interpretation of the notion of «abuse of law» continues. As O. O. Porotikova emphasizes, «in the long discussion on the problem of proper exercise of subjective rights the main accents have shifted from the study of specific features of abuse of law as a civil law tort to the fundamental question whether the word «abuse of law» has a semantic weight or is something far-fetched, groundless»[2].

Two perspectives on abuse of law are most prevalent today: the abuse of law is considered to be the exercise of subjective law contrary to the principles of good faith and other moral and ethical criteria, or it is regarded as a tort.

The term "abuse of law" is new for the civil law of Ukraine and appeared only in the new Civil Code – according to part 3 of Article 13 of the Civil Code acts of a person committed with the intention to harm another person, as well as abuse of law in other forms, are prohibited. The wording of the said provision suggests a new rule for the Ukrainian civil legislation prohibiting the abuse of subjective law by performing certain actions with the intent to harm another person, as well as the abuse of law in other forms. In this case, the abuse of law should be understood not only as acts committed by a person in the exercise of his or her subjective right with

ково-практичний коментар: у 2 ч. / За заг. ред.. Я. М. Шевченко. – К.: Концерн «Видавничий дім «Ін Юре», 2004. – Ч.1. – С.28.

[1] Див.: Притика Ю. Д. Вказ. твір. – С. 18.

[2] Див.: Поротикова О. А. Проблема злоупотребления субъективным гражданским правом. 2-е изд., испр. и доп. М.: Волтерс Клувер, 2008. – С. 126–127.

the exclusive intention of causing harm to another person. In exercising their rights, including while protecting their subjective rights, a person has the obligation to refrain from actions that might violate the rights of others. After all, any subjective civil rights have their limits. As Y. O. Pokrovsky aptly pointed out, «it feels like modern civil law is telling a person: if you are allowed to be egotistical within certain limits, it does not mean that you can be evil»[1].

There are grounds to assert that the legislator consciously extended the term for abuse of law and deviated from the definition of a person's intent to harm another person in the exercise of civil rights as a necessary condition for qualifying such actions as an abuse of law. It seems that in this way the principle of justice, good faith and reasonableness in civil law is implemented since the harm caused by the abuse of law must be compensated regardless of the existence of the respective intention of the person who exercised his rights.

There is no doubt that part 3 of Article 13 of the Civil Code of Ukraine reflects the general legal principle of the inadmissibility of abuse of law. According to Ye. V. Vavilin, this principle is a requirement for subjects not to exceed the limits of the right in the process of performance of duties and exercise of rights, to exercise their rights properly[2].

At the same time, the very appearance and existence in the civil law of Ukraine of the principle of the inadmissibility of abuse of law along with the principles of justice, good faith, reasonableness are primarily related to the objective impossibility to establish at the legislative level-specific limits of the exercise of civil rights. In our opinion, this is the main meaning and function of the principle of the inadmissibility of abuse of subjective right: to create the necessary prerequisites for responding to the actions of persons who violate subjective civil rights or legally protected interests not prohibited by law.

Summing up the analysis of the legal relationship between the institutes of protection of rights and abuse of law, we believe it is necessary to emphasize that the establishment of the fact of abuse of law in the exercise of the right to protection, among other consequences provided by law, is an independent and sufficient basis for refusing a person abusing his or her own right to protect the violated right in the way chosen by that person (Part 3, Article 16 of the Civil Code of Ukraine).

Analyzing the modern doctrine of protection of subjective rights, it is impossible to avoid the study of the **relationship between general and special remedies**.

In the science of civil law, there is a constant tendency to approach, according to which the practical significance of division of protection methods into general and special is that the establishment by law of a special method of protection of certain subjective rights or specific cases of their violation should exclude the ap-

[1] Покровский И. А. Основные проблемы гражданского права. М.: Статут, 1998. – С. 119.

[2] Див.: Вавилин Е. В. Осуществление и защита гражданских прав / Российская акад. наук, Ин-т государства и права. М.: Волтерс Клувер, 2009. – С. 275.

plication of general methods of protection for these cases. The simultaneous application of the special and general remedies is recognized by the Supreme Court of Ukraine only on the condition of their identity. Obviously, we are talking about cases when the general method of protection, for example, the recognition of a right (para. 1, part 2, article 16 of the Civil Code of Ukraine) finds its normative fixation in special norms, in particular, the possibility of recognition of the property right (article 392 of the Civil Code of Ukraine).

At the same time, the analysis of the above position gives grounds to question its universality. In this context, it is advisable to take into account the legal findings of higher judicial institutions when considering individual court cases. Thus, the courts have repeatedly noted that the choice of the way to protect personal non-property rights belongs to the plaintiff. A person whose right has been violated *may choose both general and special remedies for the protection of his/her right* determined by the law regulating specific civil legal relations[1] (italics are mine. – A. K.).

There are grounds to assert that in these cases, the Supreme Court of Ukraine (and later – and the new Supreme Court) held an opinion that does not exclude the simultaneous application of general and special methods of protection by an authorized person and does not provide general methods of protection exclusively subsidiary nature.

Similar ideas were also expressed in the scientific literature. Thus, Ya. M. Romaniuk and O. Ye. Burlai noted that «a claim for recognition of property rights may be combined in one suit with other claims. A vindication claim may be cited as an example. To satisfy it, the plaintiff must prove that he owns a disputed item that he does not possess. There may be a dispute over ownership of the disputed item, so the plaintiff often has to combine his claim for the item with a claim for recognition of ownership. In such a case, in order to decide on the question of vindication, the court must find out whether there are grounds for the recognition of ownership of the object by the claimant»[2].

At first glance, the above statements are fully consistent with the position of the court on the possibility of joint application of the methods of protection enshrined in Art. 16 of the Civil Code of Ukraine with the identical methods of protection provided by special rules (in this case, Art. 392 of the Civil Code of Ukraine). At the same time, it is unlikely that Ya. M. Romaniuk and O. Ye. Burlai would change their opinion in case if Art. 392 of the Civil Code of Ukraine did not

[1] Ухвала Верховного Суду України від 20 жовтня 2010 року по справі № 6-21843св09 [Електронний ресурс]. – Режим доступу : http://reyestr.court.gov.ua/Review/11970735 ; Рішення Верховного Суду України від 23 грудня 2009 року по справі № 6-23541св07 [Електронний ресурс]. – Режим доступу : http://reyestr.court.gov.ua/Review/8036412.

[2] Романюк Я. М. Позов про визнання права власності, віндикаційний та негаторний позови: деякі проблеми практичного застосування / Я. М. Романюк, О. Є. Бурлай // Вісник Верховного Суду України. – 2012. – № 8. – С. 35.

exist, and the requirement to recognize any right by an authorized person was based on the provisions of para. 1 p. 2 Art. 16 of the Civil Code of Ukraine.

The mere absence of Art. 392 in the current Civil Code of Ukraine would not eliminate the need to claim the recognition of property rights, along with a special remedy, which is vindication, if it was necessary due to the circumstances of the case and the nature of the violation of property rights, which may consist in the defendant's refusal to return the thing precisely because of the non-recognition of the claimant's property right.

Moreover, the rules of the civil law in force sometimes provide, or at least suggest, the joint application of general and special remedies. Thus, under the prescriptions of Part 1 of Art. 216 of the Civil Code of Ukraine an invalid transaction does not create any other legal consequences than those related to its invalidity. In the event of invalidity of the transaction, each party is obliged to return to the other party in kind everything that it received in the execution of the transaction, and in the event of impossibility of such return, in particular, when the received is the use of property, work performed, rendered service – to compensate the cost of what is received, at prices prevailing at the time of compensation. So, in the context of disputed transactions, the provisions of Part 1 of Art. 216 of the Civil Code of Ukraine put the application of a special remedy (restitution) in direct dependence on the satisfaction of the claim for recognition of the transaction null and void. The Law does not contain a requirement that both these methods of protection should be used in a single court case, but it is obvious that even if an authorized person brings two separate claims, both will be aimed at protecting one violated right. In addition, it should not be overlooked that, in addition to the requirement that the transaction be declared void and restitution applied, the law provides the authorized person with another general remedy, as provided for in paragraph Para. 8 p. 2 Art. 16 of the Civil Code of Ukraine, namely – to claim damages if they were caused in connection with the commission of an invalid transaction through the fault of the second party (Part 2 of Art. 216 of the Civil Code of Ukraine).

Summarizing the results of the analysis, we can conclude that two approaches have been formed in modern law enforcement practice. According to the first, general remedies have an auxiliary (subsidiary) nature and are applied only in the absence of a special remedy set forth in the law. According to the second approach, regardless of the nature of the protection as general and special, they may be applied simultaneously.

However, both approaches have their own concerns. Thus, the former does not take into account the many cases in which general and special remedies are applied simultaneously (in particular, as already noted, invalidation and restitution of a contract, recognition of a right in combination with special remedies, both contractual and non-contractual, etc.). The second approach is not sufficiently justified in cases where both general and special remedies can be applied

by nature, but the special remedy should be preferred. These cases are illustrated by the above conclusions regarding the application of such special remedy as the transfer to an authorized person of the buyer's rights and obligations under the concluded transaction.

In the light of the above, the following approach to the legal consequences of qualifying a method of protection as general or special in the context of law enforcement practice may be proposed:

1) the nature of a remedy, whether general or special, is relevant and should be used only in resolving a particular dispute and affects the identification of the appropriate remedy for the infringed right. The purpose of identifying these methods is to determine, among several possible or chosen by the authorized person, the appropriate and effective remedy for the protection of a specific infringed subjective right, taking into account the peculiarities of specific disputable substantive legal relations, and serves as a criterion for this classification;

2) an authorized person may apply any remedy for the protection of his or her right, provided that the application of a special remedy does not exclude the simultaneous application of a general remedy;

3) If there is a competition of special remedies due to the fact that for the protection of a specific subjective right the use of several remedies is possible, the one which corresponds to the peculiarities of the disputable substantive legal relations shall be applied.

The above rules, in our opinion, give grounds for the reasonable solution of practical legal conflicts.

Conclusions. The analysis of the doctrine of private law in the sphere of protection of subjective civil rights at the present stage gives the grounds to consider that the general vector of its development is to provide effective protection of subjective civil rights. Corresponding changes permeate the whole institute of protection of rights, starting from its doctrinal interpretation and interaction with other adjacent institutes, and ending with the influence of the doctrine on the formation of new legislative approaches and actual judicial practice, as the prevailing task of legal proceedings under the new procedural legislation is the provision of effective protection of the rights of a person appealing to a court.

References

List of legal documents

Legislation

1. Tsyvilnyi kodeks Ukrainy: Zakon Ukrainy vid 16 sichnia 2003 r. №435-IV. URL: http://zakon.rada.gov.ua/laws/show/435–15 (accessed: 23.11.2018) (in Ukrainian).
2. Tsyvilnyi protsesualnyi kodeks Ukrainy vid 18 bereznia 2004 r. № 1618-IV (red. z 15.12.2017). URL: http://zakon.rada.gov.ua/laws/show/1618–15 (accessed: 23.11.2018) (in Ukrainian).
3. Hospodarskyi protsesualnyi kodeks Ukrainy vid 6 lystopada 1991 r. № 1798-XII (red. z

15.12.2017). URL: http://zakon.rada.gov.ua/laws/show/1798–12 (accessed: 23.11.2018) (in Ukrainian).

Cases

4. Ukhvala Verkhovnoho Sudu Ukrainy vid 20 zhovtnia 2010 roku po spravi № 6-21843sv09. URL: http://reyestr.court.gov.ua/Review/11970735 (accessed: 23.11.2018) (in Ukrainian).
5. Rishennia Verkhovnoho Sudu Ukrainy vid 23 hrudnia 2009 roku po spravi № 6-23541sv07. URL: http://reyestr.court.gov.ua/Review/8036412 (accessed: 23.11.2018) (in Ukrainian).

Bibliography

Authored books

6. Dzera I. O. Tsyvilno-pravovi zasoby zakhystu prava vlasnosti v Ukraini / I. O. Dzera. – K., 2001. (in Ukrainian).
7. Gribanov V. P. Osushhestvlenie i zashhita grazhdanskih prav. – M.: «Statut», 2000. (in Russian).
8. Pohribnyi S. O. Mekhanizm ta pryntsypy rehuliuvannia dohovirnykh vidnosyn u tsyvilnomu pravi Ukrainy: Monohrafiia / S. O. Pohribnyi. – K.: Pravova yednist, 2009. (in Ukrainian).
9. Pokrovskij I. A. Osnovnye problemy grazhdanskogo prava. M.: Statut, 1998. (in Russian).
10. Porotikova O. A. Problema zloupotreblenija sub"ektivnym grazhdanskim pravom. 2-e izd., ispr. i dop. M.: Volters Kluver, 2008. (in Russian).
11. Vavilin E. V. Osushhestvlenie i zashhita grazhdanskih prav / Rossijskaja akad. nauk, In-t gosudarstva i prava. M.: Volters Kluver, 2009. (in Russian).

Edited books

12. Grazhdanskoe pravo. Ch. 1 / pod red. Ju. K. Tolstogo, A. P. Sergeeva. – M. : Prospekt, 1996. (in Russian).
13. Okhorona i zakhyst prav ta interesiv fizychnykh ta yurydychnykh osib v tsyvilnykh pravovidnosynakh / Za zah. red. akademika NAPrN Ukrainy Ya. M. Shevchenko. – Kh: Kharkiv yurydychnyi, 2011. (in Ukrainian).
14. Osoblyvosti zakhystu sub'iektyvnykh tsyvilnykh prav: Monohrafiia / Za zah. red. akademikiv NAPrN Ukrainy O. D. Krupchana ta V. V. Lutsia. – K.: NDI pryvatnoho prava i pidpryiemnytstva NAPrN Ukrainy, 2012. (in Ukrainian).
15. Tsyvilne pravo Ukrainy: Pidruchnyk / Ye. O. Kharytonov, N. O. Saniakhmetova. – K.: Istyna, 2003. (in Ukrainian).
16. 16. Tsyvilnyi kodeks Ukrainy: naukovo-praktychnyi komentar: u 2 ch. / Za zah. red.. Ya. M. Shevchenko. – K.: Kontsern «Vydavnychyi dim «In Yure», 2004. – Ch.1. (in Ukrainian).

Dissertations

17. Venediktova I. V. Zakhyst okhoroniuvanykh interesiv u tsyvilnomu pravi: Dys… dokt. yuryd. nauk: 12.00.03. – K., 2013. (in Ukrainian).

Thesis abstracts

18. Krasavchikova L. O. Grazhdansko-pravovaja ohrana lichnoj zhizni sovetskih grazhdan: Avtoref. Diss…. kand. jurid. nauk. Sverdlovsk, 1979. (in Russian).

Journal articles

Krasheninnikov E. A. Struktura sub"ektivnogo prava i pravo na zashhitu // Problema zashhity sub"ektivnyh prav i sovetskoe grazhdanskoe sudoproizvodstvo. – Jaroslavl'. – 1979. (in Russian).

Krupchan O. D. Metodolohichni zasady pryvatnopravovoi sfery hromadianskoho suspilstva // Pravo Ukrainy. – 2009. – № 8. (in Ukrainian).

21. Kuznietsova N. S. Tsyvilno-pravova vidpovidalnist i zakhyst tsyvilnykh prav // Visnyk Kyivskoho universytetu im. T. Shevchenka. – Yurydychni nauky. – 2009. – Vypusk 81. (in Ukrainian).

22. Matsehorin O. I. Poniattia ta zmist zakhystu tsyvilnykh prav // Chasopys Kyivskoho universytetu prava. – 2011. – № 3. (in Ukrainian).

23. Prytyka Yu. D. Poniattia i dyferentsiatsiia sposobiv zakhystu tsyvilnykh prav ta interesiv // Visnyk Kyivskoho universytetu im. T. Shevchenka. – Yurydychni nauky. – 2004. – Vypusk 60–62. (in Ukrainian).

24. Romaniuk Ya. M. Pozov pro vyznannia prava vlasnosti, vindykatsiinyi ta nehatornyi pozovy: deiaki problemy praktychnoho zastosuvannia / Ya. M. Romaniuk, O. Ye. Burlai // Visnyk Verkhovnoho Sudu Ukrainy. – 2012. – № 8. (in Ukrainian).

25. Stojakin G. Ja. Ponjatie zashhity grazhdanskih prav // Problemy grazhdansko-pravovoj otvetstvennosti i zashhity grazhdanskih prav. – Sverdlovsk, 1973. (in Russian).

Conference papers

26. Sulejmenov M. K. Sub"ektivnoe grazhdanskoe pravo i sredstva ego obespechenija v Respublike Kazahstan // Sub"ektivnoe grazhdanskoe pravo i sredstva ego obespechenija. Materialy Mezhdunarodnoj nauchno-prakticheskoj konferencii, posvjashhennoj pamjati Ju. G. Basina (v ramkah ezhegodnyh civilisticheskih chtenij). Almaty, 13–14 ijunja 2005 g. / Otv. red. M. K. Sulejmenov. – Almaty: NII chastnogo prava KazGJuU, 2005. (in Russian).

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